Office of Corporation Counsel

November 22, 2016

Fire Prevention and Building Safety Commission
Attn: Mara Snyder, Counsel
302 W. Washington Street
Room W246
Indianapolis, IN 46204

Dear Ms. Snyder:

The Greenwood Common Council passed Greenwood Common Council Ordinance No. 15-42, "An Ordinance to Amend the Text of Ord. 82-1 'Zoning Code,' as amended, to Establish Residential Architectural Design Standards" ("Ord. No. 15-42") on September 9, 2015. Ord. No. 12-45 was also approved by Mayor Mark W. Myers on September 9, 2015.

Pursuant to Ind. Code § 22-13-2-5 and the Johnson County Superior Court opinion in a preliminary injunction order entered in *Arbor Homes, LLC, Arbor Investments, LLC, Indiana Builders Association, Inc., and Builders Association of Greater Indianapolis, Inc. v. City of Greenwood, Indiana*, Ord. No. 15-42 may qualify as a building law requiring review by the State Fire Prevention and Building Safety Commission. Therefore, a copy of Ordinance No. 15-42 and the Court's aforementioned order are enclosed and hereby submitted to the Fire Prevention and Building Safety Commission ("Commission") for review, and approval, if necessary. Please note that it is the City's understanding that the Commission does not typically review aesthetic architectural standards passed by political subdivisions pursuant to their zoning authority and that the City reserves all rights with respect to its ability to enact such ordinances.

Please advise whether you believe Ord. No 15-42 qualifies as a building law requiring Commission review, and as to the date of the Commission meeting when it shall be considered so we may make arrangements for a representative to be present should the Commission have questions.

Your courtesy and assistance in this matter are greatly appreciated.

Sincerely,

Krista S. Taggart
Corporation Counsel

enc.
copies: Greenwood Common Council
Jeannine Myers, Clerk
Lowell Weber, Building Commissioner

300 S. Madison Avenue, Greenwood, IN 46142
Telephone: (317) 888-0494; Fax (317) 887-5717
Website: www.greenwood.in.gov

GREENWOOD COMMON COUNCIL

ORDINANCE NO. 15-42

AN ORDINANCE TO AMEND THE TEXT OF ORD. 82-1 "ZONING CODE", AS AMENDED, TO ESTABLISH RESIDENTIAL ARCHITECTURAL DESIGN STANDARDS

WHEREAS, the Greenwood Advisory Plan Commission ("Commission") conducted a public hearing on the petition for zoning text amendments relative to the creation and establishment of Residential Architectural Design Standards;

WHEREAS, the Commission, after paying reasonable regard to: 1) the Greenwood Comprehensive Plan, 2) the current conditions and the character of the current structures and uses in each district, 3) the most desirable use for which the land in each district is adapted, 4) the conservation of property values throughout the jurisdiction, and 5) responsible development and growth, made a **favorable recommendation** (9 – 0) regarding said text amendments and certified the same to the Greenwood Common Council;

WHEREAS, the Greenwood Common Council has given notice of its intention to consider this matter; and

WHEREAS, the Greenwood Common Council has considered the recommendation of the Commission and paid reasonable regard to items 1 through 5 referred to above.

NOW THEREFORE, BE IT ORDAINED BY THE COMMON COUNCIL OF THE CITY OF GREENWOOD, INDIANA, THAT:

Section 1. The Greenwood Common Council hereby amends Greenwood Common Council Ordinance No. 82-1, and Greenwood Municipal Code (1993) Chapter 10 "Zoning, Planning and Development", by adding thereto and inserting therein following the section in Article 6 on Supplementary District Regulations, a section to be known as Article 6, Section 10-107, Residential Architectural Design Standards in the words as follows:

Section 10-107 Residential Architectural Design Standards.

Statement of Purpose: The implementation of various design standards is a catalyst to ensure quality construction for present and future developments. The following requirements for residential development, therefore, are required for all new residential construction.

6.24.01. **Architectural Design Standards; Single-family and Two-family:** This section applies to single and two-family residential development in the following zoning districts: AG, S-F, R-1, R-2, R-2A, R-2B and R-3.

A. Facade:

1. Masonry:

a. Front Elevation: One (1) of the following standards must be met on the front elevation of every newly constructed single-family dwelling:

i. Dwellings that have masonry on a minimum of fifty percent (50%) of the front façade (masonry shall include brick or stone only), excluding doors, windows and other openings, and shall include architectural features from 6.24.01(A)(3): Architectural Features sufficient to accumulate:

[a] One-story: Six (6) or more points;
[b] Two-story: Eight (8) or more points.

ii. Dwellings that have masonry on less than fifty percent (50%) on the front façade (masonry shall include brick or stone only), excluding doors, windows and other

openings, shall include architectural features from 6.24.01(A)(3): Architectural Features sufficient to accumulate:

[a] One-story: Eight (8) or more points;
[b] Two-story: Ten (10) or more points.

b. Side and Rear Elevation: The side and rear facades of single-family dwellings that abut a trail shown on the Trails and Greenways Master Plan, a park shown on the Parks Master Plan, or are established on corner lots or perimeter lots shall meet either of the following standards:

i. At least thirty percent (30%) masonry as the exterior building material on the façade (masonry to include brick or stone only), excluding doors, windows and other openings, and contain at least three (3) architectural feature outlined in 6.24.01(A)(3): Architectural Features; or

ii. If the front elevation of the house conforms to §(A)(1)(a)(ii), the visible façade shall have a total of six (6) or more points from the list of architectural features outlined in 6.24.01(A)(3): Architectural Features.

2. Exterior Material: All siding shall be masonry, wood, fiber cement board siding, stucco, composite lap siding, decorative precast panels, aluminum, EIFS, or heavy-gauge vinyl (minimum of 0.047" gauge). Lap siding shall have a maximum ten-inch (10") exposed board face. Vinyl siding shall be nailed and not stapled to the side of the house.

3. Brick or Stone Wrap: All units abutting, or abutting common area/easement which abuts, a city street, trail, property, or neighborhood common area shall have a first floor brick or stone wrap. This requirement shall also apply to all units on corner lots. All units in neighborhoods zone R2-B shall have first floor brick or stone wraps regardless of location.

4. Architectural Features: All features are worth one (1) point unless indicated otherwise.

a. Front Entry:

i. Front porch equal to or greater than eight (8) feet in width and four (4) feet in depth: (2 points);

ii. Covered stoop/steps with a connection pathway from sidewalk;

iii. Architecturally treated entrances for dwellings without a front porch;

iv. Decorative front door or side lights;

b. Roof:

i. Hip roof;

ii. Multiple gables on the front elevation;

iii. Cross gable;

iv. Architectural treatments on gable ends;

v. Two (2) or more roof planes visible from the front of the dwelling; (2 points);

vi. Two (2) or more dormers;

c. Garage:

i. Decorative garage doors on front- or side-loading garages;

ii. Windows in front- or side-loading garage doors;

iii. A separate overhead door per car for each garage bay on front- or side-loading garages;

iv. No front-loading garage: (2 points);

d. Wall Planes:

i. At least a four-foot (4') deep offset at one (1) or more points along the front elevation; and

ii. At least a two-foot (2') deep offset at two (2) or more points along the front elevation,

e. Masonry:

i. Full first floor masonry (brick or stone only) on the front elevation, excluding doors, garage doors, windows, architectural features, cantilevered areas, bay windows, and any area that does not have a supporting foundation for the masonry load (including, without limitation, the small area above the garage door on some models, and any areas on the façade that are above roofing materials and would thus require masonry to be laid above the roof);

ii. Masonry accent areas (brick or stone only) on one hundred percent (100%) of the front elevation, excluding openings and areas that will not support masonry;

iii. More than two (2) masonry materials on the front elevation;

iv. Masonry detailing (either multiple quoins or other features such as arches, keystones);

v. Fiber cement siding in all areas not covered by other masonry, excluding doors, garage doors, windows, architectural features, cantilevered areas, bay windows, and any area that does not have a supporting foundation for the masonry load (including, without limitation, the small area above the garage door on some models, and any areas on the façade that are above roofing materials and would thus require masonry to be laid above the roof);

f. Projections from the Facade Plane:

i. Veranda/balcony;

ii. Sunroom (2 points; perimeter and corner lots, only)

iii. Screened porch (perimeter and corner lots, only)

iv. Breakfast nook;

v. Turret: (2 points);

g. Windows:

i. Transom window;

ii. Bay window;

iii. Decorative shutters on front elevation;

h. Architecturally enhanced/articulated trim moldings (such as sunburst louvers above windows);

i. Decorative columns composed of wood or glass.

5. Dimensions: A single-family dwelling facade shall comprise at least fifty percent (50%) of the total façade width. The garage shall not exceed more than fifty percent (50%) of the facade width.

B. Entries: Single-family dwelling entries shall have a presence toward the street and be accented with at least one

1. building-mounted light fixture.

C. Roof:

1. Minimum Pitch: 8 (vertical units):12 (horizontal units)

2. Materials: Quality roof materials such as tile, slate, cedar shake with fire protection, thirty-year dimensional asphalt or fiberglass shingles, high-quality standing seam metal roofing, or high quality metal shingle roofing shall be used on all structures. All metal roofing shall be low-gloss and a base color.

3. Minimum Eave/Overhang Width: All dwellings shall have eaves or overhangs a minimum of eight (8) inches deep on at least eighty percent (80%) of the roofline. Depth shall be determined prior to the installation of masonry.

D. Automobile Storage:

1. Minimum Garage Capacity: Minimum two-car, attached garage required.

2. Garage Capacity of Three or More Bays: Every two (2) bays (not to exceed a maximum of twenty-five feet(25')) shall have a separate door, and shall be offset two (2) feet from adjacent door(s). The term "Frontloading" applies to and includes garages that load from a primary and/or secondary frontage.

3. Minimum Garage Depth: Twenty (20) feet.

4. Garage-forward Design:

a. Front-loading garages that protrude between eight (8) and twelve (12) feet forward of the dwelling area shall have at least one (1) window installed in the garage wall that is perpendicular to the facade of the dwelling.

b. Front-loading garages that protrude between twelve (12) and sixteen (16) feet forward of the dwelling area shall have at least two (2) windows installed in the garage wall that is perpendicular to the facade of the dwelling.

c. Garages that protrude more than sixteen (16) feet shall be side-loaded and shall install a window that faces the street.

5. Carport: Carports and canopies (permanent and/or temporary) shall be prohibited.

E. Projections from the Facade Plane: In order to earn points under 6.24.01(A)(3)(f): Projections from the Facade Plane, the feature must meet the following design requirements:

1. Sunroom: The sunroom shall:

a. Be architecturally incorporated into the primary structure;

b. Be constructed of the same exterior material as the primary structure;

c. Have a glazing area in excess of forty percent (40%) of the gross area of the exterior walls;

d. Have a roof with a minimum pitch of 5 (vertical units):12 (horizontal units); and

e. Utilize the same roofing materials as the primary structure.

2. Screened Porch: The screened porch shall:

a. Be architecturally incorporated into the primary structure;

b. Be constructed of the same exterior material as the primary structure;

c. Have a roof with a minimum pitch of 5 (vertical units):12 (horizontal units); and

d. Utilize the same roofing materials as the primary structure.

F. Windows: Windows are required on all sides of the dwelling that are:

1. Adjacent to a street; or

2. Adjacent to a common area; or

3. Not perpendicular to the street.

6.24.02. **Architectural Design: Multi-family Residential.** This Architectural Design Standards (AD) section applies to developments which consist of buildings of three-units or greater within the following zoning districts: R-3, R-4, B-1, C-1, C-2, and C-3.

A. Facade:

1. Detailing: Architectural detailing, horizontal/vertical offsets, window details and other features shall be provided on all sides of the building to avoid blank walls.

2. Materials: All units must be constructed of masonry materials (brick or stone) only excluding doors, garage doors, windows, architectural features, cantilevered areas, bay windows, and any area that does not have a supporting foundation for the masonry load (including, without limitation, the small area above the garage door on some models, and any areas on the facade that are above roofing materials and would thus require masonry to be laid above the roof).

B. Entries: Entries shall be clearly defined and accented with such features as awnings, porticos, overhangs, recesses/projections, arcades, raised corniced parapets over the door, peaked roof forms and arches.

C. Roof:

1. Minimum Pitch: 8 (vertical units):12 (horizontal units).

2. Materials: Quality roof materials such as tile, slate, three-dimensional asphalt or fiberglass shingles shall be used on all structures.

3. Minimum Eave/Overhang Width: All multi-family buildings shall have eaves or overhangs a minimum of twelve (12) inches deep. Depth shall be determined prior to the installation of masonry.

4. Facade and Roof Articulation: Any structure with three (3) or more units shall incorporate significant wall and roof articulation to reduce apparent scale. Elements such as balconies, porches, arcades, dormers, cross gables, secondary hipped or gabled roofs can be used to achieve this appearance.

E. Windows: Windows are required on all sides of the building that are:

1. Adjacent to a street; or

2. Adjacent to a common area; or

3. Not perpendicular to the street.

F. Architectural Features: Each multi-family building shall each have a total of twelve (12) or more points from the following list. All features are worth one (1) point unless indicated otherwise.

1. Front Entry:

   a. Front porch equal to or greater than eight (8) feet in width and four (4) feet in depth; (2 points);

   b. Covered stoop/steps with a connection pathway from sidewalk;

   c. Architecturally treated entrances for dwellings without a front porch;

   d. Decorative front door or side lights;

2. Roof:

   a. Hip roof;

   b. Multiple gables on the front elevation;

   c. Cross gable;

   d. Architectural treatments on gable ends;

   e. Two (2) or more roof planes visible from the front of the structure: (2 points);

   f. Two (2) or more dormers;

   g. Overhangs or soffits of at least fifteen (15) inches over all exterior walls;

3. Garage:

   a. Decorative garage doors on front- or side-loading garages;

   b. Windows in front- or side-loading garage doors;

   c. A separate overhead door per car for each garage bay on front- or side-loading garages;

   d. No front-loading garage: (2 points);

4. Wall Planes:

   a. At least a four-foot (4') deep offset at one (1) or more points along the front elevation;

   b. At least a two-foot (2') deep offset at two (2) or more points along the front elevation;

5. Masonry:

   a.

   d. Masonry detailing (either multiple quoins or other features such as arches, keystones);

6. Projections from the Facade Plane:

   a. Veranda/balcony;

   b. Sunroom (perimeter and corner lots, only);

   c. Screened porch (perimeter and corner lots, only);

   d. Breakfast nook;

   e. Turret: (2 points);

7. Windows:

   a. Transom window;

   b. Bay window;

   c. Decorative shutters on front elevation;

8. Architecturally enhanced/articulated trim moldings (such as sunburst louvers above windows);

9. Decorative columns composed of wood or glass.

G. Mechanical and Utility Equipment Screening: All mechanical equipment, trash compactors, pallets, and the like shall be screened from view. Screening can be achieved by landscaping, fences or walls for ground-placed equipment, and the use of parapet walls or other roof designs for roof-mounted equipment. Screening enclosures shall be architecturally compatible with the primary structure.

Section 2. The Greenwood Plan Commission is hereby authorized to make the above described change to the text of the Greenwood Zoning Ordinance and to print and file two (2) copies of the amended zoning ordinance in the Office of the Greenwood City Clerk to keep on file for public inspection.

Section 3. The sections, paragraphs, sentences, clauses, phrases and words of this ordinance are separable, and if any word, phrase, clause, sentence, paragraph or section of this ordinance shall be declared unconstitutional, invalid or unenforceable by the valid judgment or decree of a Court of competent jurisdiction, such unconstitutionality, invalidity or unenforceability shall not affect any of the remaining words, phrases, clauses, sentences, paragraphs and sections of this ordinance.

Section 4. This ordinance shall have no effect on existing litigation or causes of action, and shall not operate as an abatement of any action or proceeding now pending or which could be brought as to any changed provision of Ordinance No. 82-1, as amended; or the Greenwood Municipal Code (1993), as amended, by virtue of the ordinances or sections of ordinances or code provisions so amended or repealed and this ordinance is to amend only as provided above and does not affect any other sections of Ordinance 82-1, as amended, or Greenwood Municipal Code (1993), as amended, except to the extent necessary to give this ordinance full force and effect.

Section 5. This ordinance shall be in full force and effect from and after its passage, approval and publication according to law.

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Passed by the Common Council of the City of Greenwood, Indiana, this 17th day of August, 2015.

J. David Hopper, President
Greenwood Common Council

FOR:		AGAINST:
Linda S. Gibson	Linda S. Gibson	
Absent	Ezra J. Hill	
	Bruce Armstrong	
Ronald Bates	Ronald Bates	
	J. David Hopper	
	Thom Hord	
Michael Campbell	Michael Campbell	
	Brent Corey	
Tim McLaughlin	Tim McLaughlin	

ATTEST:
Jeannine Myers
Jeannine Myers, Clerk

The foregoing within and attached ordinance passed by the Common Council of the City of Greenwood, Indiana, on the 17th day of August, 2015, is presented by me this 18th day of August, 2015, at 4:00 O'Clock P.M. to the Mayor of the City of Greenwood, Indiana.

Jeannine Myers
Jeannine Myers, Clerk

The foregoing within and attached ordinance passed by the Common Council of the City of Greenwood, Indiana, on the 17th day of August, 2015, is signed and approved by me this 24th day of August, 2015, at 8:00 O'Clock A.M.

MARK W. MYERS, Mayor of
the City of Greenwood, Indiana

CONFIRMATION VOTE

Passed by the Common Council of the City of Greenwood, Indiana, this 9th day of September, 2015.

J. David Hopper, President
Greenwood Common Council

FOR:		AGAINST:
	Linda S. Gibson	
	Ezra J. Hill	
	Bruce Armstrong	
	Ronald Bates	
	J. David Hopper	
	Thom Hord	
	Michael Campbell	
	Brent Corey	
	Tim McLaughlin	

ATTEST:
Jeannine Myers, Clerk

The foregoing within and attached ordinance passed by the Common Council of the City of Greenwood, Indiana, on the 9th day of September, 2015, is presented by me this 10th day of September, 2015, at 8:00 O'Clock A.M, to the Mayor of the City of Greenwood, Indiana.

Jeannine Myers, Clerk

The foregoing within and attached ordinance passed by the Common Council of the City of Greenwood, Indiana, on the 9th day of September, 2015, is signed and approved by me this 11th day of September, 2015, at 9:00 O'Clock A.M.

MARK W. MYERS, Mayor of
the City of Greenwood, Indiana

STATE OF INDIANA	)	IN THE JOHNSON SUPERIOR COURT NO. 1
	) SS:	
COUNTY OF JOHNSON	)	CAUSE NO. 41D01-1606-PL-000053

ARBOR HOMES, LLC,
ARBOR INVESTMENTS, LLC,
INDIANA BUILDERS ASSOCIATION, INC.
AND THE BUILDERS ASSOCIATION OF
GREATER INDIANAPOLIS, INC.,
Plaintiffs,

- V -

THE CITY OF GREENWOOD, INDIANA,
Defendant.

FINDINGS OF FACT, CONCLUSION AND ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The above cause of action came before the Court for hearing on August 3, 2016 on the Plaintiffs' Motion For Preliminary Injunction dated June 27, 2016. Plaintiffs Arbor Homes, LLC, Arbor Investments, LLC, Indiana Builders Association, Inc. And The Builders Association Of Greater Indianapolis, Inc. appeared by designated representatives and by counsel, Thomas F. Bedsole and Jenai M. Brackett. Defendant The City of Greenwood, Indiana appeared by it's designated representative, Clinton "Ed" Ferguson, and by counsel, John D. Papageorge, Samuel D. Hodson and Shawna Koons.

Parties sworn. Evidence presented.

And the Court, being duly advised in the premises, now FINDS as follows:

1. Plaintiffs seek a preliminary injunction as to enforcement of a municipal ordinance of the Defendant City of Greenwood. The City of Greenwood is situated in Johnson County, Indiana. The Court possesses personal and subject matter jurisdiction. Venue is properly situated in Johnson County, Indiana.

2. That the Court sets forth Findings and Conclusions in accordance with the requirement of Trial Rule 52. To the extent that a finding should be regarded as a conclusion or a conclusion as a finding, it is so found.

FINDINGS OF FACT

Parties

1. The City of Greenwood, hereinafter referred to as "City" or "Greenwood", is a municipal corporation located in Johnson County, State of Indiana.

2. Plaintiffs, Indiana Builders Association, hereinafter referred to as "IBA", and the Builders Association of Greater Indianapolis, hereinafter referred to as "BAGI", are trade associations representing the interests of their builder and developer members.

3. Plaintiff, Arbor Investments, LLC, hereinafter referred to as Arbor Investments, is an Indiana limited liability company engaged in the business of acquisition and development of land for residential use.

4. Plaintiff, Arbor Homes, LLC, hereinafter referred to as Arbor Homes, is an Indiana corporation engaged in the business of construction and sale of houses.

5. Arbor Investments is developing land that is located within the City for a subdivision known as Briarstone. Briarstone consists of six sections.

6. Arbor Homes is constructing homes in Briarstone.

7. With respect to the Briarstone subdivision, Arbor Investments is the developer and Arbor Homes constructs houses on the lots purchased from Arbor Investments. Arbor Investments and Arbor Homes are termed collectively "Arbor".

Property, Briarstone and Subdivision Development

8. In 2004, a parcel of real estate in the City was zoned with commitments concerning the use and development of the real estate. The real estate is located south of Worthsville Road, north of Pushville Road and east of the Louisville & Indiana Railroad tracks. Commitments associated with zoning included architectural design standards. Exhibit C. The architectural design standards included a requirement that "the width of the garage door shall not exceed 50% of the width of the home." Id.

9. In addition, the Commitments also contained anti-monotony rules for architectural variety ("Anti-Monotony Rules"):

> There shall be a minimum spacing of two or more lots between houses with the same front elevation. Houses with the same front elevation shall not be placed directly across the street from each other. Houses with the same exterior color scheme shall not be placed side-by-side, nor directly across the street from each other.
> Exhibit C, Par. 1.6.

10. In 2012, Arbor sought to build a new residential subdivision on the real estate for the purpose of constructing detached, single family homes. The subdivision came to be known as "Briarstone". The subdivision was situated on seventy-five (75) acres. As designed, the subdivision would consist of two hundred seventy-five (275) lots in six (6) sections.

11. Arbor designed and developed Briarstone to be a lost-cost, new housing option for consumers. Arbor offers customers fourteen (14) floor plans with sixty-nine (69) different elevations. The houses are designed and engineered to produce a house at a known cost to the consumer.

12. Paul Clare, Director of Land Development for Arbor, testified that Arbor conducts a due diligence investigation prior to property acquisition. The due diligence investigation includes identifying property suitable for residential development, how the property could be laid out for residential development, reviewing relevant laws and ordinances that would affect the development, the availability of utilities and the cost of extending utilities to the development and other costs of

development. He assesses the cost of development, the pace of development and the anticipated revenue from development. He is required to assess whether the rate of development would provide an adequate rate of return on investment to determine the feasibility of the project. Record: 10:48-49.

13. Arbor anticipates that the total cost of the Briarstone development will be Twelve Million Dollars ($12,000,000.00). Included in the cost of development is the land acquisition cost and the cost of infrastructure development, including installation of streets, sewers, waterlines and drainage. Record: 10:50.

14. The construction of a residential subdivision is initiated by the submission of a request for primary plat approval. If primary plat approval is provided, a secondary plat is submitted with greater detail. Only after secondary plat approval is provided can the secondary plat be recorded and individual lots sold. A building permit cannot be sought or issued until after secondary plat approval. Plans for specific buildings are not subject to submission until application for a building permit.

15. Ed Ferguson, the Senior Planner for the City of Greenwood, testified that all applications for primary plat approval must be filed with the City's Planning Division and approved by the Plan Commission. Upon the filing of a preliminary plat application, the plat is referred to a technical review committee before it is presented to the Plan Commission.

16. In reviewing the primary plat, the review covers issues such as compliance and conformance with the comprehensive plan, zoning ordinance and subdivision ordinances, right of way lay out, alignment of streets, perimeter and thoroughfare plan, determination whether utilities can serve the project and whether lots will meet or exceed zoning requirements. Record: 2:15. The primary plat serves the purpose of providing a general overview of a subdivision to be developed.

17. Once a primary plat is approved by the Plan Commission, a developer can move forward with application for secondary plat approval for the development. Based upon economic

considerations, property is developed in stages by breaking the project into sections.

18. An application for secondary plat approval requires more construction detail than the application for primary plat approval. The secondary plat approval process involves location, width and depth of the following: (1) placement of the streets; (2) utility right-of-way and easements; (3) common areas; (4) drainage plan; (5) water mains; (6) fire hydrants; (7) sanitary sewers; (8) building setback lines; and (9) sidewalks. The secondary plat deals with infrastructure. Record: 11:20.

19. An application for primary plat approval may only be approved by the Plan Commission. An application for secondary plat approval may only be approved by the Plan Commission or its designated official, the City's Planning Director. In Greenwood's case, the review is delegated to the City Planning Director, Bill Peeples, by Plan Commission Rule. Record: 2:16.

20. After infrastructure improvements are completed, inspected by city inspectors and the secondary plat is passed by the City Planning Director, the secondary plat is presented to the Board of Public Works. The Board of Public Works reviews the plat for dedication, acceptance of maintenance bonds and review of inspection agreements and off-site easements. The Board of Public Works must sign off on the secondary plat. Record: 2:17.

21. A developer may incur costs that are required for the subdivision as a whole and are not dependent upon a single section. Such costs may include land alteration, installation of detention ponds, road reconstruction for public roadways adjoining the subdivision, off site sewer connection and primary drainage work. Installation of roads and utilities could benefit multiple sections. Record: 10:55-56. The infrastructure must be completed prior to secondary plat application. Record: 10:59.

22. Prior to secondary plat approval for Section One of Briarstone, Arbor was required to perform off site sewer work to connect with the existing city sewer line. Record: 10:57. Arbor also had to establish detention ponds for drainage that were large enough to accommodate subsequent sections. Id. Arbor had to reconstruct a portion of Emerson Avenue, an arterial north-south roadway

adjoining the Briarstone development. Id.

23. A period of six to nine months will normally elapse from the time of primary plat approval until a developer is prepared to seek secondary plat approval. Id.

24. Demand dictates the pace at which subsequent sections need to be brought on-line. Record: 10:59.

25. A developer or builder cannot file an application for a building permit with the Building Commissioner to construct a house in a subdivision until the secondary plat has been recorded. The Building Commissioner determines whether a building permit may be issued. Record: 2:17. By Ordinance, the decision is subject to review by the Plan Commission.

26. As required by Greenwood's Municipal Code, Arbor filed an application for primary plat for Briarstone with the City's Plan Commission on December 7, 2012. The primary plat included preliminary drawings for the proposed layout of the subdivision.

27. On February 11, 2013, the Plan Commission for the City approved the Primary Plat for Briarstone. The Primary Plat provided that Briarstone would be developed in six sections.

28. The next day, Arbor requested and received an amendment to the Commitments concerning the use and development of Briarstone.

29. Arbor filed a Secondary Plat for Briarstone Section 1 on April 12, 2013. The City Plan Commission approved the Secondary Plat for Section 1, and it was recorded on October 24, 2013.

30. Prior to seeking secondary plat approval for Section Two, Arbor was required to install additional interceptor sewer lines. An interceptor sewer would serve areas beyond the Briarstone subdivision. In addition, Arbor had to perform additional work in rebuilding Emerson Avenue so as to bring the total portion of Emerson Avenue that had to be rebuilt to approximately one-half mile.

Record: 11:00.

31. Arbor Investments filed a Secondary Plat for Briarstone Section 2 on June 14, 2014. The City Plan Commission approved the Secondary Plat for Section 2, and it was recorded on October 6, 2014.

32. Prior to seeking secondary plat approval for Section 3, Arbor was required to install additional interceptor sewer. In addition, on site storm sewer work was required. A second detention pond was also installed that provided drainage to Section 3 as well as future sections 4, 5 and 6. Record: 11:01- 11:02.

33. Arbor Investments filed a Secondary Plat for Briarstone Section 3 on January 23, 2015.

34. The City Plan Commission approved the Secondary Plat for Section 3. The City Plan Commission issued a Land Alteration Permit for Section 3 on October 20, 2015.

35. The plat for Section 3 has not yet been recorded. Arbor remains in the process of securing bonds. Arbor is close to requesting that the Board of Public Works approve the bonds and sign off on the plat of Section 3. Thirty-eight (38) lots are in Section 3. Record: 11:02. It was anticipated that the lots in Section 3 would be subject to request for building permit within a matter of weeks. Record: 11:03.

36. On January 10, 2016, Arbor filed for Secondary Plat approval of Section 4 of Briarstone. Secondary plats for Sections 5 and 6 were filed on June 22, 2016.

37. On March 30, 2016, Arbor received approval for Section 4. 32. There are forty-two (42) lots in Section Four. The Secondary Plat for Section 4 has not been recorded.

38. Arbor will "pre-sell" lots to the public. The lots cannot be built upon until the secondary plat is recorded and building permits are subject to issuance. Section 3 is practically sold out from

"pre-sale". Record: 11:04. Based upon the status of the "pre-sale" of lots in Section 3, Arbor has moved forward with the development of Section 4. Portions of the roads of Section 4 are paved and infrastructure development has started. Id. Work still needs to be completed prior to submission of bonds and secondary plat for approval by the Board of Public Works for Section 4. Submission of the secondary plat should occur within a few months. Record: 11:05. No lots in Section 4 have yet been "pre-sold". Record: 11:24.

39. Arbor has submitted technical plans for Sections 5 and 6 to the City of Greenwood for review. Id. Arbor hopes to have secondary plat approval for Section 5 and 6 by late spring-early summer of 2017. Record: 11:10.

40. Neither the primary nor secondary plat applications include information related to the design of or materials to be used in the houses intended for Briarstone. Exhibits D and O.

41. The Operations Department of Arbor is responsible for applying for building permits once a secondary plat has been recorded. Record: 11:20.

42. Arbor Investments has expended Seven Million Dollars ($7,000,000.00) in developing Briarstone to date. Record: 11:22. The amount does not include construction cost of homes. Arbor Investments will expand between one and two millions dollars for Section 4. Record: 11:23.

43. The development of a subdivision is a lengthy, expensive process. A developer searches for property. Expenses are incurred in acquiring property. Expenses are incurred in preparing a plan for development of raw land for engineering and design work to submit a proposal for primary plat approval. Additional engineering and design work is required to move to submission of a secondary plat. Once plat approval is obtained, expenses are incurred for site work to prepare the property for the construction of residences, including land alteration, installation of streets, utilities, sewers and retention ponds and installation of common amenities.

44. Subdivisions are developed in stages or sections so as to enable a developer to defer

some expenses. Due to the development of a subdivision in stages, all money required is not borrowed at the beginning of the project and interest costs are thereby reduced. However, developers are required to invest in design and engineering work and a portion of the site work common to the entire subdivision. The profit derived from the sale of houses in the first portion of the subdivision offsets the cost of land acquisition and site development that are incurred in the early stages of development. As such, the sale of lots in the first sections only covers the costs advanced by the developer. Typically, a developer does not realize profit on a subdivision until the sale of lots in the later sections of a subdivision. Record: 11:26.

45. "Average" lot costs for Briarstone are in the mid-Thirty Thousand Dollars. Record, 11:27.

Ordinance And Memorandum

46. On September 9, 2015, the Greenwood Common Council unanimously enacted Ordinance 15-42, hereinafter referred to as "Ordinance", which established residential architectural design standards applicable to new residential construction within its corporate boundaries, as codified in Greenwood Municipal Code Sec. 10-107.

47. On January 28, 2016, the City's Planning Director issued a "Memorandum" regarding the intended implementation of the Ordinance.

48. The Memorandum exempted certain sections of existing subdivisions from the Ordinance's design standards, including Sections 1, 2 and 3 of Briarstone. The requirements of the Ordinance were imposed on the remaining sections of Briarstone, namely, Sections 4, 5 and 6.

Design Standards

49. The Ordinance contains design standards applicable to new, single family houses. The design standards include a requirement that a portion of the exterior consists of masonry. In

addition, the design standard limits the portion of the front elevation that constitutes the garage of the structure.

50. Adam Stone, the Greenwood City Controller, testified that the purpose of the Ordinance was to help Greenwood diversify it's housing inventory as well as stabilize assessed valuation over time. Record: 2:22. Mr. Stone noted that the City had determined that the assessed valuation of neighborhoods with higher quality building materials appreciated or grew at a higher average growth rate. Id. Increased assessed valuation then improved the long term economic viability of the City.

51. At hearing, Arbor Homes offered evidence concerning the application of the design standards under the 2015 ordinance related to the maximum percentage of garage frontage. Mr. Hatchel testified that eight of the fourteen current floor plans had garage frontage in excess of the frontage allowed under the 2015 ordinance. The six floor plans have twenty-eight (28) elevations. Record: 12:08.

52. Mr. Hatchel testified that some floor plans could be adapted. Specifically, single story floor plans on a concrete slab could be extended. However, two story homes could not be extended without risking the structural integrity of the house. Record: 12:10. Mr. Hatchel testified that plans are developed and reviewed by engineers. The structural strength of floor systems are approved by engineers. The heating and air condition system is designed with respect to the square footage of the structure.

53. Sixty percent (60%) of the floorplans constructed in Briarstone in 2016 would not be available under ordinance. Record: 12:11. The effect of the ordinance would be to eliminate the more expensive, larger homes in Briarstone. Id.

54. Briarstone is subject to "anti-monotony" rules. Based upon the reduction of floor plans, it would be more difficult to comply with the anti-monotony rules. Record: 12:15.

55. Mr. Hatchel testified that the total cost of changing a house to comport with all of the

design standards was between $12,000 and $15,000, and that Arbor Homes would charge it's customers between $20,000 and $25,000 for the upgrades required to comply with the Ordinance.

56. Evidence did not specify how Arbor Homes computed the increased cost. It is unclear what additional cost would be associated with the six floorplans and twenty-eight elevations that comply with the ordinance.

57. Arbor has a gross profit margin of fifteen to sixteen percent on the sale of homes in Briarstone. Record: 1:37. This would result in a net profit margin of four to five percent. Id.

58. Steven Hatchel, Vice-President of Sales and Marketing For Arbor Homes, testified that Arbor Homes needs to maintain a "sales pace" of three to four closing per month per community to make a project viable. Record: 11:46. If the "sales pace" is not met, Arbor Homes needs to examine the issues to determine why the "sales pace" is not being met. Prices of houses cannot be increased without negatively impacting the development of the community. Id. At 11:47.

59. The "sales pace" is affected by the price of the houses. Development is based upon a price point that Arbor Homes believes needs to be met in a community. To assess demand, data on the average house price in a community is examined as well as the percentage of homes at that price point that are being sold as a percentage of the market as a whole. Demand will suffer if the house is priced outside of that price point. Record: 11:50.

60. In the Greenwood market, 87% of houses sold are under $200,000. The average home built in Briarstone is $171,000. The average sales price in Briarstone is $30,000 to $40,000 over the average sales price. Record: 11:53.

61. Arbor Homes closed on sales of thirty-seven (37) houses in Briarstone in 2015. It was anticipated that Arbor would close on sales of fifty-six (56) houses in Briarstone in 2016. Record: 11:54.

62. Mr. Hatchel testified to a change in development practices following the 2008 recession. Prior to the 2008 recession, developers would plan for larger sections with over a hundred lots. After the 2008 recession, the size of sections was reduced. Current applications for building permits are approximately one-third of the pre-recession figure.

63. Three lots remain to be sold in Section 1 of Briarstone. Twelve lots remain to be sold in Sections 2 and 3 of Briarstone. From sale to closing takes about three months of time. Record: 1:36.

64. Five to seven lots remain in Section 3 of Briarstone. Arbor Homes has entered into contracts for the remaining lots in Section 3. Record: 11:55.

65. As Arbor Home "builds out" an addition, it will increase costs by $2,000 to $5,000. An incremental cost increase does not affect demand. However, a more substantial cost increase would affect demand. A cost increase in the magnitude of $20,000 to $25,000 would price the house in an amount substantial in excess of comparable houses in the subdivision. In likelihood the house would not appraise for the higher price based upon comparison to comparable sales in the subdivision. Hence, the price increase would affect demand. Record: 11:56.

66. As a result of factors such as increased cost to construct a comparable house, limitation of options for house plans and elevations and increased difficulty in complying with anti-monotony ordinance and commitments, the pace of development may slow and Mr. Hatchel testified that a "stigma" may come to be attached to a subdivision that may hinder a developer's efforts to finish out a subdivision.

67. Arbor has not hired a design firm to develop new floorplans that would be compliant with the ordinance. Record: 1:44. Arbor does not have other floorplans that would satisfy the ordinance that it has not already offered to consumers in the Briarstone addition. Record: 1:52.

68. Mr. Stone testified that Greenwood would retain all options if houses were constructed

in non-conformity with the ordinance, including removal of non-conforming houses. Removal of a non-conforming house was estimated at Thirty Thousand Dollars ($30,000.00).

CONCLUSIONS

1. The appropriate standard for a preliminary injunction is that "the moving party must demonstrate by a preponderance of the evidence: (1) a reasonable likelihood of success at trial; (2) the remedies at law are inadequate; (3) the threatened injury to the movant outweighs the potential harm to the nonmoving party from the granting of an injunction; and (4) the public interest would not be disserved by granting the requested injunction. (Citations omitted)." Central Indiana Podiatry, P.C. v. Krueger, 882 N.E.2d 723, 727 (Ind. 2008).

2. The Court first considers whether Plaintiffs would have a reasonable likelihood of success at trial. Plaintiffs raise three issues: (1) the enforcement of the Ordinance as to Sections 4, 5 and 6 of Briarstone would constitute the deprivation of protected property rights; (2) the City is preempted based upon the exercise of jurisdiction by the State through enactment of the State Building Code; and (3) the Ordinance exceeds the authority granted to local units of government for planning and zoning.

3. The first issue is summarized in the article: K. Crocker, Vested Rights And Zoning: Avoiding All-or-Nothing Results, 43 B.C. L. Rev. 935 (2002):

> "In real estate development, courts and legislatures use the vested rights doctrine to determine whether landowners have proceeded sufficiently far down the path of development of their land that the local government should not be allowed to enforce newly enacted zoning ordinances against them. Landowners claiming vested rights protection essentially argue that because they have invested so much money in the development of their land, relying on the local government's approval of their development plans, it is unfair to allow the local government to change the rules with respect to their project. Because the doctrine pits an individual's right to use and enjoy property against the government's power to regulate, it creates a hotly contested battleground between owners of private property and local government.
>
> From the landowner/developer's perspective, the right to use and develop land is generally one of the most important and valuable rights associated with the land. This right is, however, subject to the government's exercise of its police power. While still in the

process of development, therefore, landowners seek vested rights status because it prevents the local government from exercising police power by enforcing new zoning laws against their development. Because new zoning laws are almost always stricter, enforcement would generally require scaling back a project. Acquiring vested rights protection, therefore, preserves developers' investment in the project as originally conceived and designed. Where the acquisition of vested rights status remains uncertain, however, future profits also remain uncertain, thereby discouraging landowners from investing in development." Id. at 935-936.

4. The ability of the government to regulate under the police power for the general welfare is subject to existant property rights. Insofar as property rights have vested, the property rights are not subject to divestiture by a change in regulation. The divestiture of rights then implicates the Taking Clause of the Fifth Amendment to the United States Constitution as applied to the States through the Fourteenth Amendment. See, Am. Jur. 2d Constitutional Law Sec. 384, Appropriate Regulation Of Right To Use Property. (2016).

5. In Indiana, vested rights analysis must begin with the Indiana Supreme Court's decisions in Metropolitan Development Commission of Marion County v. Pinnacle Media, LLC, 836 N.E.2d 422 (Ind. 2005)(Pinnacle I), rehearing granted, 846 N.E.2d 654 (Ind. 2006)(Pinnacle II). In *Pinnacle I*, Justice Sullivan noted two disparate lines of cases in Indiana. The first line of cases dealt with the "zoning law principle called 'nonconforming use'" A nonconforming use is a use of property that lawfully existed prior to the enactment of a zoning ordinance that continues after the ordinance's effective date even though it does not comply with the ordinance's restrictions. Metro. Dev. Comm'n. V. Marianos, 274 Ind. 67, 408 N.E.2d 1267, 1269 (Ind. 1980)." 836 N.E. 2d at 425. Justice Sullivan wrote:

> "A relatively frequent subject of land use litigation is whether a developer can have a 'vested interest' in a nonconforming use that is only intended - construction has not yet begun at the time of the new enactment - such that the government cannot terminate it. See Linda S. Tucker, Annotation, Activities In Preparation For Building As Establishing Valid Nonconforming Use or Vested Right To Engage In Construction For Intended Use, 38 A.L.R.5th 737, 752 (1996 & Supp. 2005).
>
> This Annotation reflects the fact that many courts, including ours, have been presented with cases where a developer encounters a zoning change after embarking on a project, but before beginning construction. The leading Indiana case on the subject - discussed in the Annotation - is Lutz v. New Albany City Plan Comm'n, 230 Ind. 74, 101 N.E.2d 187 (1951).
>
> As a general proposition, the courts have been willing to hold that the developer

> acquires a 'vested right' such that a new ordinance does not apply retroactively if, but only if, the developer '(1) relying in good faith, (2) upon some act or omission of the government, (3) . . . has made substantial changes or otherwise committed himself to his substantial disadvantage prior to a zoning change." Delany & Valas, supra, at 31-35 (citing Sgro v. Howarth, 54 Ill. App. 2d 1, 203 N.E.2d 173, 177 (Ill. Ct. App. 1964))." Id. at 425-426.

Justice Sullivan noted a second line of cases that "trace its origin in Indiana law to zoning law but has over the years been invoked more generally when a person has an application for a government permit pending at the time a law governing the granting of the permit changes." Id. at 426. The leading case in the second line of cases is Knutson v. State ex rel. Seberger, 239 Ind. 656, 160 N.E.2d 200 (1959)(on reh'g). The holding in *Knutson* was summarized "that an application for approval of a subdivision plat was not subject to the provisions of a subdivision control ordinance enacted by a town council after the date on which the application was first filed." Id.

In *Pinnacle I*, Justice Sullivan restated the rule that a city ordinance cannot be given retrospective application when by doing so existing or vested rights are disturbed or destroyed. 836 N.E.2d at 427.

In the prior case of Knutson v. State ex rel Seberger, 239 Ind. 656, 160 N.E.2d 200 (Ind. 1959), the Supreme Court had held that "an application for approval of a subdivision plat was not subject to the provisions of a subdivision control ordinance enacted by a town council after the date on which the application was first filed." 836 N.E.2d at 426. In *Pinnacle I*, the Supreme Court held that the filing of a building application was insufficient to create a vested right. 836 N.E.2d at 428. The creation of a vested right was dependent upon some level of performance of construction having been completed. Id. In finding that no construction activity had yet been commenced or construction expenditures made, the Supreme Court held that Pinnacle had not acquired a vested property interest. Id.

6. In *Pinnacle II*, the Supreme Court expounded further upon it's earlier decision. Justice Sullivan wrote: "The point is that the focus is on whether or not vested rights exist, not whether some filing has been made with a government agency, a filing that might be purely ministerial and

represent no material expenditure of money, time, or effort. We acknowledge, as perhaps our original opinion should have, that vested rights may well accrue prior to the filing of certain applications." 846 N.E.2d at 656-657. However, the Supreme Court deferred the issue of the circumstances that would result in recognition of vested rights to future decisions. 846 N.E.2d at 657.

7. The thrust of the *Pinnacle* decisions is to provide a unified approach to vested rights analysis from the two lines of case authority. In holding that vested rights may accrue prior to the filing of an application, the "existing use" that would be required to prevent a retroactive enforcement of an ordinance, as set forth in the *Lutz* decision, may be based upon a contemplated use arising from the developer's change of position. See, 7-41 Zoning And Land Use Controls Sec. 41.02 (2016).

8. Inasmuch as legal protection of a property interest occurs at the point of vesting, the only variable is then the point at which vesting occurs. See, K. Crocker, Vested Rights And Zoning: Avoiding All-Or-Nothing Results, 43 B.C.L. Rev. 935 (2002).

9. In seeking guidance from other jurisdiction as to the circumstances that would result in recognition of vested rights, a review of the law of other jurisdictions does not provide clear guidance. Thompson on Real Property, Thomas Edition notes:

"May the developer rely on those rules being the ones that local officials will use in evaluating the application or be forced to submit to adverse changes in land use rules while the application is pending, or, worse, be subject to changes enacted after the plan was approved and the subdivision map recorded?

Precedent can be found for every conceivable answer, sometimes within the same state. Even in California, there are decisions holding that the subdivider isn't protected from subsequent land use ordinance changes until a building permit is obtained and construction begins, and cases holding that once the subdivider secures approval of a tentative map, the developer can proceed in reliance on it free of later-enacted ordinances or general plan amendments." 9-85 Thompson on Real Property, Thomas Editions Sec. 85.15 (2016).

10. An annotation entitled Activities In Preparation For Building As Establishing Valid Non-Conforming Use Or Vest Right To Engage In Construction For Intended Use, 38 A.L.R.5th 737 (1996) states:

> "Most courts hold that a building permit is necessary to provide a basis to vest a nonconforming use. Some courts do not require a building permit, but extend vested right protection to one who was entitled to a building permit upon the filing of a building permit application. Other courts protect the property owner even if he did not make expenditures in reliance on a permit. More often, courts require substantial reliance on a valid permit for rights to vest. Substantial reliance consists of one or more of the following: substantial expense, contractual obligations, or preconstruction activity at the site. Moreover, it is incumbent upon the builder to act in good faith.
>
> There are three versions of the "substantiality" test. Many courts hold that the landowner must have incurred a certain amount of expense and obligation toward the project, an assessment that is done on a case-by-case basis. Other courts have adopted the ratio test and compare the percentage of amounts spent to the project cost as a whole. A few courts engage in a balancing test where the expenditures are but one factor to consider." Id.

11. The three approaches are identified in the article Vested Rights And Zoning: Avoiding All-or-Nothing Results, 43 B.C. L. Rev. 935 (2002) as the majority, minority and early vesting rule, although "variations and overlaps" are noted. Id. at 937.

The majority rule provides "that landowners will be protected when, relying in good faith upon an act or omission of the local government, they have made substantial expenditures or commitments prior to a change in the zoning law. This rule, also referred to as the 'building permit plus construction' rule, is followed in more than 30 states. Although the rule itself speaks vaguely of an act or omission of the local government, most states that follow this rule require the act to be in the issuance of a building permit". Id. at 940.

The minority rule dispenses with the requirement of issuance of a building permit and "defines government approval as any sitespecific approval, such as a preliminary plat." Id. At 945. Some versions dispense with the "substantial reliance" requirement. Id.

The article terms the "early vesting rule" as a variant of the minority rule under which "a developer can obtain vesting as of the date of application for a site-specific permit." Id. At 949.

11. The majority rule developed at a time when building was simpler and consisted of building a single structure upon a lot. The right necessary from the government for the project was

a building permit. Hence, a rule establishing late vesting of rights while allowing maximum flexibility to local governments was sufficient. Id. at 955.

12. The increased cost and complexity of development has resulted in earlier vesting based upon the recognition of the change of position of the developer in the earlier stages of development. The developer has large sums of money at risk based upon a change in regulation. Earlier vesting deprives local government of flexibility in regulation. Id. at 957-958.

13. In the article, Try To Vest, Try To Vest, Be Our Guest: The Vested Rights Conflict In Indiana Creates A Unique Solution For All Development, 39 Ind. L. Rev. 417 (2006), Tyler Kalachnik notes the issue in vested rights analysis from the standpoint of the developer:

> "Vesting is usually viewed as an 'all-or-nothing' battle with the government. Investors in land development look to the vested rights doctrine as the 'legal mechanism' that decides the winner 'in the conflict between . . . property owner(s) and the local government.' The existence of a vested right to continue development will often be determinative of whether a project is a success or failure. Without a clear vesting standard, developers are left in an environment of confusion and uncertainty which may discourage future development activity. In addition, uncertainty can spur litigation and increase costs for developers and purchasers. Furthermore, demoralization costs to developers are high when a risk exists that an investment in building could be lost because of a change in the law. Investors are less likely to engage in development activity if their property can be taken by 'frequent (unjustified) changes in the law.'"
>
> Id. at 419.

14. Under the *Pinnacle* decisions, Indiana has rejected the filing of a building permit as the basis for establishing vested rights. *Pinnacle II* would suggest the possibility of vesting even before the filing of an application subject to a change of position in reliance upon an act or omission of the government. The *Pinnacle* decisions place Indiana as an early vesting state. Justice Sullivan's language in *Pinnacle* II requires that the court examine the builder/developer's change of position. One commentator has noted that the exact point in the process at which Indiana recognizes a right

as having vested remains unclear. Note: Try To Vest. Try To Vest. Be Our Guest: The Vested Rights Conflict In Indiana Creates A Unique Solution For All Development, T. Kalachnik, 39 Ind. L. Rev. 417, 418 (Ind. 2006). Mr. Kalachnik noted that the rule expressed in the Pinnacle I decision (Pinnacle II is not discussed and was presumably issued subsequent to the article) "essentially subscribed to a rule consistent with *Shell Oil Co.* And the 'earlyvesting' law of the state of Washington. This latest chapter in Indiana's vested rights saga only created more confusion. Which rule can developers rely upon with assurance that it will be consistently applied? How can the government maintain control and power of land without gaining too much of an advantage with *Lutz* in its back pocket?" Id. at 437.

15. The extent of the builder/developer's change of position is also significant in the absence of a bright line standard based upon application for, or issuance of, a permit. *Pinnacle* defers the issue to future consideration. In his discussion, Justice Sullivan quoted the law review article by John J. Delaney and Emily J. Vaias, Recognizing Vested Development Rights As Protected Property In Fifth Amendment Due Process and Takings Claims, 49 Wash. U. J. Urb. & Contemp. P. 27, 31-35 (1996) in noted:

> "As a general proposition, the court have been willing to hold the developer acquires a 'vested right' such that a new ordinance does not apply retroactively if, but only if, the developer "(1) relying in good faith, (2) upon some act or omission of the government, (3) . . . has made substantial changes or otherwise committed himself to his substantial disadvantage prior to a zoning change." Id. (citing Sgro v. Howarth, 54 Ill. App. 2d 1, 203 N.E.2d 173, 177 (Ill. Ct. App. 1964).

16. While expressly rejected in some states, the substantial change of position is the standard across the land in both the majority and minor rule states. See, K. Crocker, Vested Rights And Zoning: Avoiding All-or-Nothing Results, 43 B.C. L. Rev. 935 (2002)

17. During the course of the *Pinnacle* decisions, the Indiana General Assembly enacted Indiana Code 36-7-4-1109. Indiana Code 36-7-4-1109© provides:

> "© Subject to section 1110 of this chapter (now expired), if a person files a complete application as required by the effective ordinances or rules of a local government agency for a permit with the appropriate local governmental agency, the granting of the permit, and the

granting of any secondary, additional, or related permits or approvals required from the same local governmental agency with respect to the general subject matter of the application for the first permit, are governed for at least three (3) years after the person applies for the permit by the statutes, ordinances, rules, development standards, and regulations in effect and applicable to the property when the application is filed, even if before the issuance of the permit or while the permit approval process is pending, or before the issuance of the secondary, additional, or related permits or approvals or while the secondary, additional, or related permit or approval process is pending, the statutes, ordinances, rules, development standards, or regulations governing the granting of the permit or approval are changed by the general assembly or the applicable local legislative body or regulatory body. However, this subsection does not apply if the development or other activity to which the permit relates is not completed within ten (10) years after the development or activity is commenced."

18. The General Assembly then created a period of at least three (3) years after "permit" application under which the process would be controlled by the ordinances in effect at the time of application.

19. *Pinnacle II* makes clear that vested rights may be recognized based upon the developer/builder's change of position. *Pinnacle II* would relate the determination based upon whether there has been a "material expenditure of money, time, or effort".

20. The issue of when rights vest must also be considered against a backdrop of a change in development practices. Justice Young of the Michigan Supreme Court noted in a concurring opinion in Dorman v. Twp. of Clinton, 477 Mich. 955, 957, 723 N.E.2d 905, 906-07 (2006):

> "What is particularly pertinent is that the majority rule evolved at a time three-quarters of a century ago during which a single building permit may have been all that was required for even a major building project. Since then, however, the process of securing such permits has changed drastically in most jurisdictions, including in Michigan. Major building projects will often require multiple permits from multiple federal, state, and local agencies." Id.

21. In the article Searching For Certainty: Virginia's Evolutionary Approach To Vested Rights, E.A. Prichard and Gregory Riegle note:

"For the real estate developer, the increased need for clarity is driven by the realities of the development approval process. In recent years the stakes have become very high for the development community. The cost of land suitable for development has skyrocketed. Obtaining land-use approvals has become more difficult and more expensive. Overall, population growth has

increased scrutiny of new proposals and the effort and consultants fees expended to secure necessary support. Moreover, the land developers have been under similar pressure. The demand in the marketplace for larger, complex and more expensive projects created the need for larger investments and more complex, financing arrangements. Similarly, the need for more intensive and expensive preliminary engineering, land-use planning and architectural work and longer development periods made the issue of vested rights more critical. The trend toward increasingly complicated land-use regulations and the demand for larger, more expensive, and more complicated development projects, enhanced the classic conflict of public and private interests that has been manifested by controversies concerning the law governing vested rights in land uses." E.A. Prichard and Gregory A. Riegle, Searching For Certainty: Virginia's Evolutionary Approach To Vested Rights, 7 Geo. Mason L. Rev. 983, 999 (1999).

22. Tract developers and builders have changed the nature of residential development. Previously, a developer would subdivide property for sale to individual homeowners or builders. The subdivision of the land was the end result inasmuch as lots would be marketed to the consumer. The builder would be an entity different from the developer. With tract developers, the subdivision is merely a step in the process of producing a lot upon which the developer may construct a structure. The end result to be achieved by the developer is the structure and not a buildable lot. The vertical integration of the roles of developer and builder, then make it difficult to apply rules developed in an earlier era.

23. The article Vested Rights and Zoning: Avoiding All-or-Nothing Results includes an observation of the changing nature of development and the application of the majority rule. Although Indiana does not follow the majority rule, the analysis is inciteful to changing residential development practices:

"The majority rule was originally developed at a time when most construction consisted of single building projects on single parcels, therefore requiring only one permit - the building permit. Although the rule in that context does provide a measure of certainty and objectivity, in modern land development such approval is issued very late in the planning process. Developers of large projects are typically required to secure numerous local government approvals before the building permit, often requiring substantial expenditures on surveys, environmental studies, architectural drawings, and other planning tools. If a local government makes a significant change in the zoning law after developers have made this investment, but before they have secured a building permit, the developers stand to lose considerable sums of money.

The rule (referring to the majority rule) is particularly onerous for developers of large-scale projects who prefer to proceed in phases, securing building permits and commencing construction on one stage before proceeding to the next. If, for example, the local government amended the minimum

lot size ordinance after issuing the building permits for the first phase, but before issuing the permits to other phases, the developer could be forced to alter the plans for the remaining phases to conform to the amended ordinance. The majority rule could not protect such a developer on the basis of the issuance of just one building permit, because securing one permit and commencing construction on one unit out of many would not constitute substantial reliance. Requiring such a developer to secure all the building permits and commence construction on the entire project at once, however, seems unreasonably burdensome."
K. Crocker, Vested Rights And Zoning: Avoiding All-or-Nothing Results, 43 B.C. L. Rev. 935 (2002)

24. Here, Arbor applied for and received primary plat approval for Briarstone. Arbor has expended considerable resources in the development of Briarstone. The issue is what rights have then vested. Stated differently, at what point in the development of a subdivision does the right to construct particular structures become vested. Arbor asserts that it has the right to construct upon the lots buildings in conformity with the ordinances in effect at the time of submission and approval of the primary plat. Greenwood denies that a right to build a structure comes into existence until the time of application for and/or issuance of the building permit. The parties rely upon an interpretation of Indiana statute. Accordingly, the Court begins by examining Indiana Code 36-7-4-1109(b).

25. Plaintiffs rely upon a "stacking" interpretation of Indiana Code 36-7-4-1109(b). Plaintiffs read the statute to provide that each "permit" application, as defined at Indiana Code 36-7-4-1109(b), results in a three (3) period that protects the developer from a change in the local ordinance up to the maximum ten (10) year period. As herein relevant, "permit" is defined to include primary plat approval, secondary plat approval and building permit. Indiana Code 36-7-4-1109(b). Plaintiffs contend: "Each filing was made within three years of a preceding "permit" and all were filed in accordance with the zoning rights emanating from the Primary Plat, as subsidiary permits thereof." P.12-13, Brief In Support Of Motion For Preliminary Injunction. The result would be to "stack" time periods.

26. Defendant contends that the submission of subsequent "permits" does not extend the three (3) year period from approval of the initial "permit". Defendants assert that "(r)eading a 'stacking' provision into the statute would render the time constraints meaningless and is not

supported by any rule of statutory construction." Par. 60, Defendant's Proposed Findings Of Fact, Conclusions Of Law And Order Denying Plaintiffs' Motion For Preliminary Injunction.

27. The Court does not find a "stacking" provision within Indiana Code 36-7-4-1109. Paragraph © provides that "if a person files a complete application . . . for a permit with the appropriate local governmental agency, the granting of the permit, and the granting of any secondary, additional, or related permits or approvals required from the same local governmental agent with respect to the general subject matter of the application for the first permit". Paragraph (b) defines permit. Paragraph © makes clear that the analysis begins with the first "permit" in time to which application is made to a "local governmental agency". "Permits" are then classified as "secondary, additional, or related permits" insofar as the later permits relate to the same "general subject matter". To accord the same status to all "permits" would render the language "secondary, additional, or related permits" meaningless. Insofar as a "permit" is a "secondary, additional, or related" permit with respect to the "general subject matter" of the first permit from the "same local government agency", a new three year period does not result.

28. Arbor filed it's primary plat application on December 7, 2012. Accordingly, the "statutes, ordinances, rules, development standards, and regulations in effect" as of December 7, 2012 controlled the "the granting of the permit, and the granting of any secondary, additional, or related permits or approval required from the same local governmental agency" through December 7, 2015 at a minimum. The Secondary Plat for Sections 4, 5 and 6 of Briarstone were filed after December 7, 2015, to-wit: Section 4 on January 10, 2016 and Sections 5 and 6 on June 22, 2016. The Court is unable to determine that Indiana Code 36-7-4-1109© would bar the application of the Ordinance as to Sections 4, 5 and 6.

29. Defendant asserts that approval of subdivisions and issuance of building permits are controlled by separate local government agencies. Inasmuch as the primary plat approval is issued by the Plan Commission and a building permit is issued by the Building Commissioner, the City asserts that the building permit is not a secondary permit to the primary plat permit. Accordingly, no vested right to construct a building can come into existence until the submission of a building

permit application.

30. Indiana Code 36-7-4-1109 defines "local governmental agency" as including "any agency, officer, board, or commission of a local unit of government that may issue: (1) a permit; or (2) an approval of a land use or an approval for the construction of a development, a building, or another structure."

31. Under Indiana Code 36-7-2-2, "(a) unit may plan for and regulate the use, improvement, and maintenance of real property and the location, condition, and maintenance of structures and other improvements. A unit may also regulate the platting and subdividing of real property and number the structures abutting public ways."

32. Indiana Code 36-7-2-4 provides: "(a) unit may regulate methods of, and use of materials in repair, alteration, and construction of structures and other improvements. The unit may also require the execution of a bond by any person repairing, altering or constructing structures or other improvements."

33. A "unit" is defined to include a municipality under Indiana Code 26-1-2-23.

34. A "permit" is defined to include an "improvement location permit", "(a) building permit" and "(a)pproval of primary or secondary plat".

35. The delegation of planning and zoning is to the unit, which is the City in this case. When Indiana Code 36-7-4-1109 was enacted in 2006, the General Assembly would have been aware of the defined term of "unit" under Indiana Code 36-1-2-23. Instead, the General Assembly used the term "local governmental agency". "(L)ocal governmental agency" is defined to include "any agency, officer, board, or commission of a local unit of government". Indiana Code 36-7-4-1109 applies to "any secondary, additional, or related permits or approvals required from the same local governmental agency with respect to the general subject matter of the application".

36. Primary plat approval is vested with the plan commission. Indiana Code 36-7-4-707. Secondary plat approval is vested with the plan commission or the plat committee or staff to which the plan commission has delegated authority. Indiana Code 36-7-4-710. Improvement location permits are subject to issuance by an official within the jurisdiction of the plan commission. Indiana Code 36-7-4-602.

37. Under Greenwood's Building Code, matters pertaining to building construction are "within the jurisdiction of the Greenwood Plan Commission." Sec. 7-3, Building Code. A decision of the Building Commissioner is subject to appeal to the Plan Commission. Sec. 7-17, Building Code. Enforcement of a violation is in the name of, and with the approval of, the Plan Commission. Sec. 7-18, Building Code.

38. In all instances, the "permit" is subject to issuance by the plan commission or an official subject to the jurisdiction of the plan commission. The permits are found to be from the same local government agency.

39. Furthermore, the inclusion of the building permit in the list of permits under Indiana Code 36-7-4-1109(b) would suggest that the General Assembly intended for the building permit to be a secondary permit under Indiana Code 36-7-4-1109©.

40. Consequently, although an improvement location permit is subject to issuance by the City's Building Commissioner, the Building Commissioner is not a separate "local governmental agency" for purposes of application of Indiana Code 36-7-4-1109.

41. In addition, Greenwood also asserts that Arbor has not submitted an application for a building permit. Inasmuch as Indiana Code 36-7-6-1109 is dependent upon a permit application, Greenwood asserts that no vested rights are established. P. 5, Post-Hearing Brief.

42. For purposes of Indiana Code 36-7-6-1109, Greenwood's argument is a variant of the assertion that the Plan Commission and the Building Commissioner are not the same local

government agency under Indiana Code 36-7-6-1109. Insofar as the Building Commissioner is separate from the Plan Commission, the City asserts that the permit application is required for purposes of Indiana Code 36-7-6-1109. The Court has determined that the Plan Commission and Building Commissioner constitute the "same local government agency". Indiana Code 36-7-6-1109 establishes a minimum three year period of time and a maximum ten year period of time. While rejecting an automatic "stacking" provision, Indiana Code 36-7-9-1109 does not foreclose the acquisition of vested rights after the three year period. The statute only provides for vesting "for at least three (3) years". Implicit is the recognition that a vested right may extend beyond the three year period.

43. Indiana Code 36-7-4-1109© does not bar the application of the Ordinance to Sections 4, 5 and 6 of Briarstone. However, the Court's inquiry is not concluded. The issue of whether Plaintiff has acquired a vested right is not dependent upon statute but upon whether the law recognizes a vested property right. If a vested property right exists, it is accorded constitutional protection as a property interest.

44. In determining whether a vested right exists, the Court then returns to the *Pinnacle* decisions. *Pinnacle II* places the focus upon the developer's 'material expenditure of money, time or effort'. However, the analysis was otherwise left to future consideration.

45. The court is considering a subdivision. The question is then what rights vest at which point in time based upon a developer's change of position and what is the change of position that then supports the vesting of rights? More particularly, the issue is whether Arbor has a vested right to construct houses that complied with Greenwood's ordinances when Briarstone was platted but which are now non-conforming as a result of the Ordinance. Do the rights to construct particular houses accrue when rights vest as part of the primary plat or is the right separate so that it does not come into existence until reference to the point of application for a building permit?

46. The difficulty in determining the point of vesting and the rights that are vested is illustrated in the diversity exhibited by the states in determining at what point rights vest. The

difficulty in striking the appropriate balance between a property interest and government regulation is exhibited by the effort to achieve flexibility in application of the vested rights doctrine. For instance, Tyler Kalachnik in the article Try To Vest, Try To Vest, Be Our Guest: The Vested Rights Conflict In Indiana Creates A Unique Solution For All Development, 39 Ind. L. Rev. 417 (2006) urged a flexible standard for vesting based upon factors including type of structure, number of permits, investment by the developer in the project and social utility of the proposed development and the best and highest use. The greater the complexity of the project and the greater the capital at risk would suggest earlier vesting. Karen Crocker in the article Vested Rights And Zoning: Avoiding All-or-Nothing Results, 43 B.C. L. Rev. 935 (2002) proposes that the only variable should not be the point of vesting but also the rights subject to vesting. In attempting to analyze the gradations of competing interests while using only one variable, the result is often an unfair result or the lack of a coherent standard.

47. The analysis is also affected by the changing nature of development. As noted above, projects have become more complex, required more capital and been subject to greater regulation. In addition, with the integration of the developer and builder in tract development, the end product of Arbor's development of Briarstone was the marketing of a completed house to the consumer as opposed to a buildable lot. The result of the "Great Recession" is that sections might have previously been larger, whereas the effects of the recession has resulted in a subdivision being developed in smaller sections.

48. In an effort to establish the rights subject to vesting, the developer's role and expectations have to be considered. Here, Arbor is a vertically integrated developer/builder. Many factors are examined in determining whether Arbor will undertake a project. The end product of the development of Briarstone was the marketing of a completed house. The cost benefit analysis performed by Arbor is based upon the project in its entirety. It is the result of this analysis that Arbor makes a business decision to proceed with a project. Various laws and ordinances control the process. The cost benefit analysis performed by Arbor prior to undertaking the project to determine if the project is economically feasible is made upon the laws and ordinances then in effect. A building permit is a step in the development process in reaching the end project of a completed

house.

49. The *Pinnacle* decisions have placed Indiana among the "early vesting" states. Acquisition of vested rights is then not dependent upon a fixed point in time, such as established by the application for a permit, but rather upon the developer's change of position. If the appropriate examination is then the developer's change of position, the appropriate standard would logically be the developer's change of position for the project as a whole. To review the project from the standpoint of individual lots is contrary to the project as conceived by the developer. The end result is not the lot, but rather the constructed house. If the project is then conceived as a whole, the rights acquired by the "right to develop" would include the right to acquire those permits necessary to see the project to completion. To isolate the developer's right to obtain a building permit from the rights acquired at the time of primary plat approval, would artificially segment the development process so as to inhibit effective cost-benefit analysis at the time of development of the subdivision plan.

50. The issue presented in this case, whether a developer has a vested right to construct buildings under the ordinances in effect at the time of the primary plat application, has been addressed on a single prior occasion in Indiana. The issue has only been considered in the pre-*Pinnacle* decision of the Indiana Court of Appeals in the case of Yater v. Hancock County Board of Health, 677 N.E.2d 526 (Ind. Ct. App. 1997). In the case, Yater had secured approval of a subdivision plat. At the time of approval of the subdivision plat, the Indiana Administrative Code permitted in ground septic systems in fill dirt. Yater was able to obtain septic permits as needed for development within the subdivision. Subsequently, regulations were changed and septic permits were no longer subject to being obtained for lots with fill dirt. In seeking septic permits for eleven unimproved lot in the subdivision, Yater asserted that "he had a vested right to obtain septic permits under the rules that were in effect when the subdivision was approved". Id. At 529. Relying upon the cases of Environmental Management v. Chemical Waste Management of Indiana, Inc., 604 N.E.2d 1199, 1205 (Ind. Ct. App. 1992)(hazardous waste disposal permits), trans. denied and Board of Zoning Appeals of the City of Fort Wayne v. Shell Oil Co., 164 Ind. App. 497, 329 N.E.2d 636, 642 (1975)(building permit), the Court held that the "(t)he right to use property under prevailing

regulations accrues with the application of a permit." Id. The Court then held that inasmuch as an application for a septic permit had not been made, a vested right did not exist.

51. The Court may conclude that the benchmark of applying for a permit has been vacated by the *Pinnacle* decisions. *Pinnacle II* expressly states that a vested right may come into existence pre-application. However, what is significant is that the Court of Appeals did not relate the vesting of the right to the date of application or approval of the subdivision plat but rather looked to the date of application for the septic permit. Also significant, although the act of sanitary waste disposal may be deemed an important exercise of governmental police powers, the governmental interest in enacting the change of regulation was not taken into account in the Court's determination. However, inasmuch as *Pinnacle II* noted that vested rights could accrue prior to the time of application for a permit, the issue of the nature of the application and the date of the developer's actions become less significant in the analysis. *Pinnacle II* focuses on the developer's change of position. The analysis applied in *Yater* would be overruled by the analysis applied in *Pinnacle II.*

52. The Court looks to the law in other "early vesting" states. In considering whether the developer of a subdivision could complete a subdivision based upon prior local governments approvals notwithstanding that the subdivision lots were smaller than required by subsequent ordinance, the New Hampshire Supreme Court noted that "the plaintiff initially invested in the property comprising the subdivision with a view toward the use of the entire property as a subdivision. To date, it has developed approximately seventy percent of the subdivision in accordance with its original plan in good faith, reasonable reliance upon the town's ongoing approval of that plan over a period of years. It is clear that since the time it purchased the property in 1966, the plaintiff has viewed and developed the subdivision as a single homogeneous project. It would be unfair and unreasonable to say, at this time, that the plaintiff and its successors in interest may not develop the remaining lots in conformity with the distinct character of the developed portion of the subdivision in which they are located." Henry and Murphy, Inc. v. Town of Allenstown, 120 N.H. 910, 913, 424 A.2d 1132, 1134 (1980).

53. In the case of Board of Commissioners of South Whitehall Township v. Toll Brothers,

Inc., 147 Pa. Commw. 298, 607 A.2d 824 (1992), the Commonwealth Court of Pennsylvania considered the impact of an increase of a water and sewer connection fee from $500 to $4,000 per lot on a developer's rights. The Court held that "(i)t seems apparent that at some point the magnitude of a fee increase adopted by a municipality can affect a developer so substantially as to render his 'right' to develop meaningless." 147 Pa. Commw. at 303, 607 A.2d at 826.

54. In the case of Cannon v. Clayton County, 253 Ga. 63, 335 S.E.2d 294 (1985), the Georgia Supreme Court considered a case where a developer sought to build mobile homes on property that was suitably zoned for mobile homes but the developer was precluded from obtaining a building permit based upon a moratorium on permits for mobile home parks. In recognizing the developer's vested rights, the Court noted that: "'(w)here a landowner makes a substantial change in position by expenditures in reliance upon the probability of the issuance of a building permit, based upon an exiting zoning ordinance and the assurance of zoning officials, he acquires vested rights and is entitled to have the permit issued despite a change in the zoning ordinance which would otherwise preclude the issuance of a permit.'" 253 Ga. at 64, 335 S.E.2d at 295 (quoting Barker v. County of Forsyth, 248 Ga. 73, 76 (281 S.E.2d 549 (1981)).

55. While retaining the reference to the building permit, Illinois has expanded the frame of reference to include the "probability of issuance of a building permit" as a basis for vesting of rights. See, Reserve at Woodstock, LLC v. City of Woodstock, 2011 Il. App. (2d) 100676, 354 Ill. Dec. 904, 958, N.E.2d 1100 (App. Ct. 2d Dist. 2011); Roply v. Hernandez, 299 Ill. Dec. 710, 842 N.E.2d 747 (App. Ct. 1st Dist. 2005), as modified on denial of rfeh'g, (Feb. 7, 2006); 1350 Lake Shore Associates v. Casalino, 299 Ill. Dec. 535, 842 N.E.2d 274 (App. Ct. 1st Dist. 2005); Morgan Place of Chicago v. City of Chicago, 2012 Il. App. (1st) 091240, 975 N.E. 2d 187 (Ill. App. Ct. 1st Dist. 2012).

56. In the case of Noble Manor Company v. Pierce County, 133 Wn.2d 269, 943 P.2d 1378 (1997), the Washington Supreme Court considered the issue of whether "the filing of a complete application for a short subdivision vest(s) only the right to divide the property, or does it also vest the right to develop the property under the land use and zoning laws in effect on the date of the

application?" 133 Wn. at 274, 943 P.2d at 1381.

57. In holding that the rights that vest included the right to develop so as to enable the developer to obtain building permits, the Washington Supreme Court looked to the legislative history of the Washington statute in determining that rights to develop vested at the time of filing of plat application. 133 Wn. at 278, 943 P. 2d at 1383. The Court noted that "development interests protected by the vested rights doctrine come at a cost to the public interest because the practical effect of recognizing a vestged right is to sanction the creation of a new nonconforming use. If a vested right is too easily granted, the public interest is subverted. Erickson, 123 Wn. at 873-74. However, we also recognize developers' needs for certainty and fairness in planning their developments." 133 Wn. at 280, 943 P.2d at 1384

58. Authors Gregory Overstreet and Diana M. Kirchheim tout the Washington standard as leading "the nation in protecting development-related constitutional rights." G. Overstreet & D. Kirchheim, The Quest For The Best Test To Vest: Washington's Vested Rights Doctrine Beats The Rest, 23 Seattle U.L. Rev. 1043, 1046 (2000). The authors assert that Washington's "strong protections benefit both citizens and government by creating certainty and enforcing fairness, while at the same time allowing municipalities flexibility to exercise their health, safety, and welfare powers. In addition, both landowners and local governments benefit from strong vesting protections, because they are not consumed with lengthy and costly court battles. Id. at 1047.

59. The court turns to the facts of this case. Briarstone was conceived as a single project. The primary plat application contained all six sections. Section O. The primary plat application did not include plans for the structures that would be constructed in Briarstone. Exhibit D, Exhibit K. The secondary plat applications for sections one through four did not include plans for the structures. Exhibits F, G, H and I. (A secondary plat application was also submitted on June 22, 2016 without submission of plans for structures but the application does not identify the section. Exhibit J).

60. The subdivision control statute does not require submission of building plans at the time of either primary or secondary plat application. See, Indiana Code 36-7-4-702; Indiana Code 36-7-4-

709. The plans for a structure would not be subject to review or submission until application is made for an improvement location permit. Indiana Code 36-7-4-801.

61. The building plans would not be subject to submission by ordinance at the time of submission of the primary or secondary plat. Sec. 10-505, Exhibit W.

62. The houses offered to customers for construction in Briarstone are based upon established floor plans and elevations. Exhibit V. Building plans complied with Greenwood's ordinance at the time of submission of the primary plat for Briarstone.

63. Indiana Code 36-7-4-1109 contemplates that an improvement location permit, a building permit and a certificate of occupancy are defined as "permits". Insofar as they are subsequent in time to primary and secondary plat approval, the permits are secondary to the prior issuance of a primary "permit". The Court has considered and rejected Greenwood's assertion that the building permit is issued by a different "local government agency". Accordingly, Indiana statutorily recognizes a building permit as a permit subject to an existing vested right that may be created by the primary plat application and approval.

64. In addition, the 2011 amendment to Indiana Coded 36-7-4-1109© that increased the period of time that rights are subject to being vested from seven (7) years to ten (10) years makes little sense if the period does not represent the total period for development including all permits. While Indiana does not maintain a legislative history such as was relied upon by the Washington Supreme Court, a similar construction arises from the terms of the statute.

65. While leaving substantial questions unanswered, *Pinnacle II* held that "vested rights may well accrue prior to the filing of certain applications". The *Pinnacle* cases note the developer/builder's change of position. The article cited by Justice Sullivan, J. Delaney & E. Valas, Recognizing Vested Development Rights As Protected Property In Fifth Amendment Due Process and Takings Claims, 49 Wash. U. J. Urb & Contem. L. 27, 31-35 (1996) refers to the "substantial changes" by the developer/builder or the developer/builder has "otherwise committed himself to his

substantial disadvantage". Id. The *Knutson* decision cited the standard from Corpus Juris Secundum which stated that "retrospective laws are unconstitutional if they disturb or destroy existing or vested rights." Knutson v. State ex rel. Seberger, 239 Ind. 656, 668, 160 N.E.2d 200, 201 (1959)(on reh'g).

66. The developer/builder's change of position is commonly assessed under the "substantiality" test. Activities In Preparation For Building As Establishing Valid Non-Conforming Use Or Vest Right To Engage In Construction For Intended Use, 38 A.L.R.5th 737 (1996).

67. As to the evidence of Arbor's change of position, the Court notes the following:

A. Briarstone was presented as a single project.

B. Briarstone was to be constructed based upon fourteen (14) floorplans with sixty-nine (69) different elevations.

C. Secondary plat applications have been approved for three sections of the six sections of the project with approximately one-half of the total lots.

D. Arbor has completed infrastructure improvement for sections one, two and three. Infrastructure improvement of section four is underway.

E. Arbor has expended Seven Million Dollars ($7,000,000.00) for the development of Briarstone to date.

F. Portions of the infrastructure installed will serve sections four, five and six, including sewers, ponds for drainage and improvement of adjoining access roads.

G. The cost to adapt a house to comport with Greenwood's ordinance is $12,000 to $15,000. Including Arbor's gross profit margin of 15% to 16%, the increased cost to the consumer would be $13,800 to $17,400.

H. The additional cost to comply with the Ordinance in Sections Four, Five and Six would be between $1.65 million and $2.06 million.

I. The increased cost of houses will negatively effect Arbor's ability to finish out the Briarstone subdivision inasmuch as the newly constructed homes will be eight percent (8%) higher than the cost of a comparable house in Sections One, Two and Three. In addition, the limitation on selection of elevations for a given lot due to anti-monotony requirements will limit the elevations available for a given lot. Inasmuch as larger houses

will not be available, houses available in Sections Four, Five and Six will be less appealing the larger the family size.

68. Arbor has made a substantial change of position based upon the grant of primary plat approval.

69. Does the change of position then include the right to construct houses that were contemplated by Arbor as part of the plan for the subdivision? The Court has noted the project would be conceived of and presented as a single project for purposes of development, financing and marketing. If the developer/builder has acquired a vested right, that right would logically include the right to complete the project in it's original form.

70. Plaintiffs analysis is based upon a mechanical application of Indiana Code 36-7-4-1109. However, Plaintiffs rely upon Arbor's change of position in developing Briarstone as a whole. Defendant looks to the building permit. Greenwood argues that "Arbor Homes did not file an application for a building permit for Sections 4-6, and the evidence demonstrates that it has not expended any money for the construction of homes in Sections 4-6." Par. 65, Defendant's proposed Findings Of Fact, Conclusions Of Law And Order Denying Plaintiff's Motion For Preliminary Injunction. By focusing upon the right to construct a particular structure, the result becomes the majority rule standard as expressed in the *Lutz* decision.

71. Greenwood's assertion is interesting inasmuch as the City's practice is not consistent with it's argument. The City's Memorandum does not apply the Ordinance to "emerging residential developments" for "ten years from the date of application for secondary plat approval or upon the complete build-out of lots within the section, whichever comes first." Exhibit B. As such, the City applies the Ordinance to Briarstone, Section 1 as of April 12, 2023, Section 2 as of June 16, 2024 and Section 3 as of January 23, 2025. Id. The Building Permit Application states:

> "On September 9, 2015, the City of Greenwood adopted Architectural Design Standards. These standards are required for all new residential construction whether in a new or established neighborhood or subdivision.
>
> Any subdivisions where Secondary Plats were initially filed between June 3, 2005 and June 3, 2015 are exempt from these standards for 10 years from the initial filing date

of the plat. All others filed prior to June 3, 2015 (sic) or after June 3, 2015 will be reviewed for Architectural Design Standard compliance." Exhibit DD.

72. The *Pinnacle* decisions also require that the developer/builder must act in good faith. The Court finds no evidence that Arbor did not act in good faith at all times.

73. Other factors may also come into play in determining the point at which rights vest. In consideration that *Pinnacle II* has left issues for future consideration, the court considers such factors. In the article, Searching For A Standard For Regulatory Takings Based On Investment-Backed Expectations: A Survey Of State Court Decisions In The Vested Rights And Zoning Estoppel Areas, 36 Emory L. J. 1219 (1987), the author identifies issues considered by courts in vested rights analysis.

> "Although the various standards can be differentiated from one another, they have certain common elements that reflect the important issues courts have been concerned with in the regulatory takings area. These issues include timing, detrimental reliance, diligent pursuit and official assurance. The interplay of these issues within a standard suggests the importance of various state interests such as creating certainty in the law, maintaining judicial discretion over takings questions or preserving the faith in city officials. In analyzing the state court standards, it is important to observe the ways in which the courts balance their desire for legal certainty with their desire to maintain some subjective control over when a taking has occurred." Id. at 1269.

74. Timing refers to the point in the process when rights vested. As noted above, *Pinnacle II* has placed Indiana squarely in early vesting based upon recognition that rights may vest pre-application.

75. Detrimental reliance refers to the developer/builder's change of position. Referring to the North Carolina case of Transland Properties, Inc. v. Board of Adjustment, 18 N.C. App. App. 712, 198 S.E.2d 1 (1973), and the California case of Santa Monica Pines, Ltd. v. Rent Control Bd., 35 Cal. 3d 858, 679 P.2d 27, 201 Cal. Rptr. 593 (1984), Ms. Ackerman notes that "the landowner must also show detrimental reliance in the form of 'substantial expenditures' or 'substantial beginnings,' both of which are determined by the courts. In determining what is 'substantial,' the courts do not use a specific dollar figure, but rather they evaluate the facts of each individual case. This subjective analysis suggests the state's additional interest in maintaining some judicial

discretion over the vesting of property rights." Id. at 1269.

76. The third element is that of diligent pursuit. Ms. Ackerman notes that "(l)andowners who have made a diligent effort to develop their property are protected by the vesting of their property rights, while those who have done little to promote the development of their property are not given the protection of vesting." Id. at 1271.

76. The fourth element of official assurances invokes considerations analogous to estoppel. "The importance of official assurances lies in the fact that when an individual landowner seeks the advice of city officials concerning the legality of his proposed development, he should be able to rely on what the officials tell him." Id.

77. In assessing the third and fourth considerations, the Court notes that Arbor has been diligent in developing the Briarstone subdivision. In assessing the development in the post-Recession period of construction, diligence is not subject to challenge.

78. Vesting of rights is based upon the developer/builder's change of position in reliance upon the local government. Here, there is no evidence that Arbor presented the floor plans and elevations to the City with the primary or secondary plat applications. There is no evidence that Arbor sought any assurance from the City by submission of the floor plans and elevations.

79. However, Arbor's floor plans and elevations did comply with the City's ordinance at the time of submission of the primary plat. Arbor's financial analysis for determining whether to proceed with the project would necessarily have been based upon the cost factors from structures allowed under the ordinance at the time of submission of the primary plat. Inasmuch as Arbor's cost-benefit analysis would have been based upon houses allowed under the ordinance at the time of submission of the primary plat, the submission of the actual floor plans and elevations to Greenwood at the time of primary plat would offer nothing. The floor plans and elevations were permissible at the time of submission of the primary plat. See, Henry and Murphy, Inc. v. Town of Allenstown, 120 N.H. 910, 912, 424 A.2d 1132, 1134 (1980)(owner may rely upon the absence of

regulation).

80. Vested rights analysis creates an ability to rely upon regulation in place at the time of the commencement of the project. Arbor's business analysis was performed based upon that regulation. The building plans are not required until later in the process under Indiana law. This does not change the fact that the building plans are part of the submission for the building permit that is but one permit required for the entire project. The concept that the developer may acquire rights so as to be able to finish the project recognizes that not all information will be presented to the government for all permits at the time of primary plat application. Even though the house floor plans may not have been submitted with the primary plat application, the developer is nonetheless relying upon the state of regulation at the time of submission of primary plat application in making the decisions with respect to a project. The fact that building plans were not subject to submission with the primary plat application should not be determinative in establishing those rights acquired from the right to develop inasmuch as there is nonetheless reliance upon the state of regulation.

81. Greenwood asserts that Arbor may develop building plans that could comply with the Ordinance. Arbor acknowledged that plans could be developed, but that it had not looked into it. Greenwood's argument goes to the consideration that "if the proposed development would be 'equally useful under the new zoning requirements, a vested right in the already approved subdivision may not be claimed based on the alternations." 9-52D Zoning And Land Use Controls Sec. 52D.03(4)(citing Ramapo 287 Ltd. Partnership v. Village of Montebello, 568 N.Y.S. 2d 492 (N.Y.App. Div. 1991).

82. Significant in the Court's opinion is the testimony that the cost of compliance would be $1.65 to $2.06 million and would affect the development of the remaining sections of Briarstone. The testimony was not challenged. No evidence was presented as to the cost of developing floorplans that would comply with the ordinance. If the developer/builder could comply with the ordinance with minimal cost, that would be significant in determining the extent of the developer's change of position for application of the "substantiality" tests.

83. Based upon the evidence submitted, the Court does find that Arbor has changed position to such an extent as to meet the "substantiality" tests.

84. The Court would conclude that Briarstone was planned as a single project based upon the ordinance in effect at the time of submission of the primary plat. Arbor and the City contemplated that building permits would issue for the 275 lots that were approved. The building permit is a necessary secondary permit to the primary permit of primary plat approval. To limit the examination to the issue of whether application had been made for a building permit would ignore the realities of current real estate development by a vertically integrated developer/builder. As noted, the end product is not a buildable lot but a constructed house. The issuance of a building permit is a secondary step in a single project.

85. Greenwood asserts that it's exercise of police power is proper for the reason that the exercise does not constitute a regulation that violates the taking clause of the Fifth Amendment. Greenwood asserts that Arbor has not suffered a physical invasion of it's property and Arbor has not been denied of 'all economically beneficial or productive use of the land.' P. 67, Defendant's Proposed Findings Of Fact, Conclusions Of Law And Order (citing City of Marion v. Howard, 832 N.E.2d 528, 531-32 (Ind. Ct. App. 2005).

86. While the Court would agree that the Ordinance does not cause a per se taking, a taking may nonetheless exist based upon "an 'ad hoc' inquiry . . . based on the balance of three factors: '(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the government action." City of Marion v. Howard, 832 N.E.2d 528, 531-532 (Ind. Ct. App. 2005)(quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015, 120 L.Ed. 2d. 798, 112 S.Ct. 2886, 2893 (1992)).

87. These factors are addressed in the assessment of the developer's change of position in determining whether a right has vested so as to receive protection against a subsequent change in regulation.

88. The Court concludes that Arbor does have a reasonable likelihood of success at trial on it's claim that it has acquired a vested right so as to preclude enforcement of the Ordinance.

89. The Court then turns to Plaintiffs' second contention that the Ordinance is preempted by statute.

90. Indiana Code 22-13-2-1 provides that "(e)xcept as provided in this article, state agencies and political subdivisions may exercise their statutory powers to regulate buildings, structures, and other property." Indiana Code 22-13-2-3 provides that "(e)xcept to the extent provided in subsection ©, the rules adopted under section 2 of this chapter take precedence over: . . . (2) any ordinance or other regulation adopted by a political subdivision that covers the same subject matter as the commission's fire safety rules or building rules." Indiana Code 22-13-2-5(b) provides in parts relevant: "(e)xcept as provided in subsection ©, an ordinance or other regulation adopted by a political subdivision that qualifies as a fire safety law or a building law: (1) must be submitted to the commission for review within thirty (30) days after adoption by the political subdivision; and (2) is not effective until: (A) it is approved by an order issued by the commission; or (B) it is approved as the result of the commission not having issued an order approving or denying the ordinance or other regulation within the period set forth in section 5.5(2) of this chapter."

91. Indiana Code 22-13-1-2 defines "building rule" as "a rule that: (1) is adopted by the commission; and (2) qualifies as a building law under IC 22-12-1-3." Indiana Code 22-12-1-3 defines "building law" as "any equipment law or other law governing any of the following: (1) Fabrication of an industrialized building system or mobile structure of installation, assembly, or use at another site. (2) Construction, addition, or alteration of any part of a Class 1 or Class 2 structure at the site where the structure will be used. (3) Assembly of an industrialized building system or mobile structure that is covered by neither subdivision (1) nor (2)." Indiana Code 22-12-1-5 defines "Class 2 structure" to include "a building or structure that is intended to contain or contains only one (1) dwelling unit".

92. City asserts that the Ordinance does not provide for "building standards" but rather

"design standards". P. 6, Post-Hearing Brief.

93. The term "building law" is defined to include any law governing the construction of a Class 2 structure, which is defined to include a single family residence.

94. The City asserts that "(t)he Indiana Building Code focuses on building safety, not aesthetics and property value." P. 19, Defendant's proposed Findings of Fact. Indeed, the City's assertion is correct. The Building Code is directed to building safety and not aesthetics. However, the statute is broadly drafted. Literally, every ordinance governing construction must be submitted to the Building Commission for review. The Building Commission then has the opportunity to determine if an ordinance affects a building's safety. One may conclude that the purpose of the statute is to permit the Building Commission to review local ordinances affecting construction to determine if there is an impact on building safety as opposed to a municipality making a determination on it's own that the ordinance did not conflict with State Building Code. The Court finds no provision in statute that excepts out ordinances intended solely for aesthetic purposes.

95. Section 10-107 of the Ordinance provides: "Statement of Purpose. The implementation of various design standards is a catalyst to ensure quality construction for present and future developments. The following requirements for residential development, therefore, are required for all new residential construction." Exhibit A.

96. By it's terms, the Ordinance applies to construction of a Class 2 structure.

97. The City is not preempted from passing an ordinance affecting the construction of single family residences. The power is expressly given to the City under Indiana Code 22-13-2-1. However, the General Assembly has required that ordinances governing construction be submitted to the Building Commission for review. Indiana Code 22-13-2-5.5 provides the Building Commission with a period of time to conduct a review which consists of three (3) commission meetings. If no action is taken, an ordinance is automatically approved.

98. The Court then concludes that the Ordinance was required to be submitted to the Building Commission for review in accordance with Indiana Code 22-13-2-5. Evidence does not support the submission of the Ordinance to the Commission. The Ordinance is therefore not effective until approved by the Commission or by operation of Indiana Code 22-13-2-5(b)(2). Indiana Code 22-13-2-5(b).

99. Lastly, Plaintiffs assert that the City is not authorized to impose aesthetic standards for new construction under a zoning ordinance. Indiana Code 36-7-4-601(c) provides:

"When it adopts a zoning ordinance, the legislative body shall act for the purposes of:

(1) securing adequate light, air, convenience of access, and safety from fire, flood, and other danger;

(2) lessening or avoiding congestion in public ways;

(3) promoting the public health, safety, comfort, morals, convenience, and general welfare; and

(4) otherwise accomplishing the purposes of this chapter."

100. In the case of Goldsmith v. City of Indianapolis, 208 Ind. 465, 196 N.E. 525 (Ind. 1935), the Indiana Supreme Court stated that "(i)t is now generally recognized that . . . the type of building which may be erected in given localities, have a direct relationship to the public welfare". 208 Ind. at 466, 196 N.E. at 526.

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101. The treatise Zoning and Land Use Controls states of zoning to protect aesthetic values:

"Some communities (usually upscale suburbs in major metropolitan areas) include significant aesthetic standards in their zoning ordinances, which is the subject of Chapter 16. Aesthetic regulations may range from limitations on advertising signed (the subject of Chapter 17) to detailed architectural controls on new buildings (see generally Sec. 16.01).

The evolution of the law in this field is important to understand. In the early days, aesthetics were not considered a valid public purpose adequate to support zoning (see Sec. 16.03). Some jurisdictions then began to accept aesthetics as a valid auxiliary, or supporting, purpose, where there were other, more fundamental (health and safety) purposes as well (Sec. 16.04). Today, most

jurisdictions accept aesthetics alone as a valid purpose for sign regulations and other zoning controls (see Sec. 16.05 and Sec. 17.02))"

1-1 Zoning and Land Use Controls, Sec. 1.03

102. Regulation for aesthetic purposes is a valid exercise of governmental police power. Berman v. Parker, 348 U.S. 26, 32-33-, 75 S.Ct. 98, 102-103, 99 L.Ed. 27 (1954). Based upon the *Goldsmith* decision, advancement of aesthetic purposes is related to the general welfare. Indiana Code 36-7-4-601(c) vests communities with authority to enact ordinances for the general welfare.

103. The Ordinance is a proper exercise of a delegated power.

104. The Court turns to the second element, whether the remedies at law are inadequate.

105. Plaintiffs rely upon the per se rule as a basis for equitable relief. P. 15, Post-Hearing Brief. "It is well settled that, where the action to be enjoined is unlawful, the unlawful act constitutes 'per se 'irreparable harm' for purposes of the preliminary injunction analysis. See Short On Cash.net of New Castle, Inc. v. Dept. of Fin. Insts., 811 N.E.2d 819, 823 (Ind. Ct. App. 2004); Ferrell v. Dunescape Beach Club Condominiums Phase I, Inc., 751 N.E.2d 702, 713 (Ind. Ct. App. 2001). When the per se rule is invoked, the trial court has determined that the defendant's actions have violated a statute and thus, that the public interest is so great that the injunction should issue regardless of whether the plaintiff has actually incurred irreparable harm or whether the plaintiff will suffer greater injury than the defendant. See Black's Law Dictionary 1162 (7th ed. 1999)(per se means of, in, or by itself). Accordingly, invocation of the per se rule is only proper when it is clear that a statute has been violated." Dept. Of Fin. Insts. v. Mega Net Servs., 833 N.E.2d 477, 485 (Ind. Ct. App. 2005).

106. The Court has determined that there is no evidence that the Ordinance was submitted to the Building Commission so that it would not be effective under Indiana Code 22-13-2-5. The finding supports application of the per se rule.

107. Furthermore, Arbor asserts that monetary damages would be difficult to quantify. By this assertion, Arbor contends that damages would be dependent upon the Ordinance's impact upon the development of Briarstone, the increased cost of money as a result of slowed development, the houses constructed as a result of the change in building standards and the impact upon the profits derived from the sale of the house.

108. While an action for inverse condemnation would lie for the divestiture of any vested rights, the legal remedy must be as complete, practical, efficient and adequate as the relief available in equity. Indiana & Michigan Electric Co. V. Whitley Cty. R.E.M.C., 160 Ind. App. 446, 448, 312 N.E.2d 503, 505 (1974). The Court concurs with Arbor's assessment that the amount of damages is dependent upon a number of factors such that the determination of damages would be difficult. The legal relief would not be as complete, practical, efficient and adequate as the relief available in equity.

109. The Court turns to the third element: "the threatened injury to the movant outweighs the potential harm to the nonmoving party from the granting of an injunction".

110. The harm to Arbor would be a divestiture of a property interest. The Ordinance would adversely effect the development of the Briarstone addition as approved by primary plat. The harm to Greenwood would be the development of the remainder of Briarstone without the aesthetic standards set forth in the Ordinance. The aesthetic standards are designed to improve neighborhoods and to increase assessed valuation. However, the application of the Ordinance would result in the elimination of larger houses so that the remaining floor plans available would be less diverse and of lower price. As applied in this situation, the Ordinance may well be counter-productive.

111. The Court would conclude that the balancing of harms favors Arbor.

112. The Court considers the fourth element: "the public interest would not be disserved by granting the requested injunction."

113.The protection of property rights is in the public interest. See, Aberdeen Apts. v. Cary Campbell Realty Alliance, Inc., 820 N.E.2d 158, 168 n. 6 (Ind. Ct. App. 2005). Based upon the Court's determination that the Ordinance is not in effect due to a failure to submit to the Building Commission under Indiana Code 22-13-2-5(b), the grant of injunction is in the public interest.

114. Greenwood asserts that Plaintiffs have not exercised the right to seek a variance. The Court considers the assertion under "ripeness" and "exhaustion". See, Sec. 84, Defendant's proposed Findings of Fact and Conclusions.

115. Greenwood must render a final decision on land use for Arbor's claim to be ripe for adjudication. See, City of Marion v. Howard, 832 N.E.2d 528, 534 (Ind. Ct. App. 2006). The Planning Director's "Memorandum" clearly establishes that Greenwood intends to apply the Ordinance to Sections IV, V and VI of Briarstone. A final decision has been rendered.

116. Arbor may seek a variance to construct houses that do not conform to the Ordinance. However, inasmuch as the "Memorandum" has clearly applied the Ordinance to Sections IV, V and VI of Briarstone, the assertion that Arbor is required to seek a variance for approximately one hundred thirty-seven houses that would not conform to the Ordinance would only be an exercise in futility. See, M-Plan, Inc. V. Ind. Comprehensive Health Ins. Ass'n., 809 N.E.2d 834, 839 (Ind. 2004).

117. The Court finds that a preliminary injunction should enter in favor of Arbor staying the enforcement of the Ordinance as to Sections IV, V and VI of Briarstone subject to bond as hereinafter established.

118. Plaintiffs seek a preliminary injunction staying the enforcement of the Ordinance generally.

119. A vested rights analysis is not suited for the type of broad generally applicable relief requested by BAGI and the IBA on behalf of their members. Analysis of vested rights is fact

sensitive.

120. BAGI and IBA do not identify any harms apart from the Briarstone addition as to give rise to a justiciable claim.

121. The Court declines relief apart from Sections IV, V and VI of the Briarstone Subdivision.

122. The Court turns to the issue of bond. In his testimony, Mr. Stone testified that Greenwood would reserve the option of removing any house constructed in non-conformity with the Ordinance. Accordingly, the bond should be set in an amount sufficient to cover the value of a house that may be constructed in violation of the Ordinance during the period for hearing on Plaintiff's Motion For Injunction and appellate review of the Preliminary Injunction and any Injunction that may be entered as well as the demolition costs of such house.

123. In establishing bond, the Court takes the following factors into consideration:

A. The Court has determined that the Ordinance was subject to submission to the Building Commission.

B. Pursuant to Indiana Code 22-13-2-5, the Ordinance is not effective.

C. Indiana Code 22-13-2-5.5 provides for a period of review of up to three (3) sessions of the Building Commission.

D. After the review period, continuation of the preliminary injunction would be based upon the vested rights analysis.

E. The average cost of a house in Briarstone is One Hundred Seventy-One Thousand Dollars ($171,000.00).

F. Demotion costs were estimated at Thirty Thousand Dollars ($30,000.00).

G. Fifty-six (56) homes were, or will be, constructed in Briarstone in 2016.

H. Sixty per cent (60%) of the houses constructed in Briarstone would be eliminated under the ordinance.

I. A period of a year is allowed for the time that will be required for the parties to proceed

to hearing on the petition for injunction as well as possible appellate review. The period is reduced by three months for submission of the Ordinance to the Building Commission.

J. Bond is established in the amount of the average cost of a house and demotion costs for sixty percent (60%) of the houses that Arbor would construct in Briarstone for a nine (9) month period.

124. Security is established in the amount of Five Million Dollars ($5,000,000.00). Temporary injunction shall issue upon bond being posted in such amount with the Clerk of Johnson County in cash or by security approved by the Court in accordance with Trial Rule 65©.

IT IS THEREFORE ORDERED BY THE COURT, That a Preliminary Injunction is entered by the terms of which Ordinance No. 15-42 is stayed from enforcement as to Sections IV, V and VI of the Briarstone subdivision upon security being posted in the amount of Five Million Dollars ($5,000,000.00) with the Clerk of Johnson County in cash or by security approved by the Court in accordance with Trial Rule 65©.

This Order is entered in writing on the 1st day of November, 2016 at 5:40 P.M.

KEVIN M. BARTON, JUDGE
JOHNSON SUPERIOR COURT NO. 1

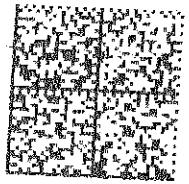
Distribution:

Thomas F. Bedsole
Jenai M. Brackett
Frost, Brown Todd LLC
201 North Illinois Street, Suite 1900
P.O. Box 44961
Indianapolis, IN 46244-0961

John D. Papageorge
Samuel David Hodson
Taft Stettinius & Hollister, LLP
One Indiana Square, Suite 3500
Indianapolis, IN 46204

Shawna E. Koons
225 South Emerson Avenue, Suite B
Greenwood, IN 46143

Clerk



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City of Greenwood
Legal Department
300 S. Madison Avenue
Greenwood, Indiana 46142

Fire Prevention and Building Safety Commission
Attn: Mara Snyder, Counsel
302 W. Washington Street
Room W246
Indianapolis, IN 46204